

PUTTING PAID TO THE UNTOUCHABLES?¹

The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime Units

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When law enforcement agencies arrest abalone poachers on the Western Coast of South Africa, they may not be aware that the drying and processing of the delicacy takes place in Gauteng and that the buyers are organised crime networks in China. It will not be evident that the criminals use the profits (at about R1 400 per kilogram) to buy drugs for the local Southern African market. The syndicate or loose network of crime groups may have a distribution chain of dispensable individuals of different nationalities encompassing several countries, specialising in particular aspects of the trade and dealing in a wide variety of illegal goods. Indeed, the arrest of the poachers is unlikely to reveal that the profits are being used to barter for drugs and that a large number of illegal and apparently legal companies are being used to transfer money across the globe. Catching these kinds of transnational, cross-border, multi-ethnic and flexible criminal groups is difficult unless law enforcement agencies have a multi-faceted strategy, use the skills of a wide range of personnel and have the time and resources to investigate and prosecute them effectively. Traditional law enforcement is geared towards arresting the criminal 'runners' rather than the 'kingpins'. The DSO and the SCCU acquired a reputation as the 'untouchables' – units that are admired, revered and feared – and it seems unlikely that their replacement will enjoy the same success and reputation.

In February 2008 the Minister of Safety and Security, Charles Nqakula, announced a turnaround strategy for the criminal justice system after an internal review showed that there was little planning, poor implementation, and inadequate skills in the departments responsible for criminal justice, and little coordination between them. A realignment of these departments under the leadership of a 'political champion' (a position

similar to that of the British Home Secretary) is envisaged to achieve greater strategic and operational unity in the fight against crime. Ironically, the Directorate of Specialised Operations (the 'Scorpions') and the Specialised Commercial Crime Units (SCCU), which have pioneered the concept of integrated project-based investigations using the skills of co-located prosecutors, investigators and analysts and other support

personnel, are facing closure.³ The proposed new unit in the South African Police Service, which will replace these structures, may not employ the same approach or methodology. This may jeopardise South Africa's battle against those 'untouchables' involved in serious and complex organised and financial crime and corruption.

Organised crime and corruption in South Africa

Transnational organised crime and corruption may be among the defining domestic and foreign policy challenges of this century. The financial power of organised crime groups poses a serious threat to the South African economy and its financial system because they undercut the prices of legitimate businesses and undermine the integrity of financial institutions. Furthermore, corrupt elected officials weaken democratic institutions and deprive the government of revenue that could be used to provide citizens with basic needs. Financial crime and corruption, the International Monetary Fund estimates, may strip the economy of 0.5-1 per cent of economic growth per annum. In 2007, 72 per cent of South African business had fallen victim to economic crime. Of these 38 per cent reported corruption and bribery (Price Waterhouse Cooper 2007). South African companies lost between one and four per cent of their sales revenue owing to violent and other types of crime and the costs of security (African Private Sector Group World Bank 2006).

The international and regional community of states has taken unprecedented steps to create legal frameworks and institutional mechanisms to combat organised and financial crime and corruption, and to monitor and seize illegal profits. South Africa is a signatory to these protocols on organised crime, corruption and related matters and has enacted legislation to counter these forms of crime. It has built several institutions, based on international best practice, and at significant cost tasked them with implementing the legislation. These include the SAPS Organised Crime Unit, the DSO, the Specialised Commercial Crime Units, the Special Investigation Unit, the Financial Intelligence Centre and the Asset Forfeiture Unit, to name a few. These agencies form part of a multi-faceted strategy to make the regulatory environment less welcoming,

to disrupt the activities of crime groups and to effectively investigate and prosecute them. The benefit of having multiple agencies is that they provide checks and balances on the activities of the other units in an environment where criminal groups may attempt to penetrate these institutions to evade detection. Yet they are able to cooperate effectively in pursuit of the common goal of prosecuting offenders and seizing their assets.

DSO/SCCU models of investigation and prosecution

In South Africa, specialist units such as the DSO and SCCU were established because it became clear that traditional forms of investigation and prosecution were not working in complex organised and financial crime and corruption cases where convictions are difficult to obtain.

The DSO has a mandate to investigate serious and complex organised and financial crimes and corruption. The mandate is wide in recognition of the fact that these forms of crime evolve rapidly, the criminal groups are highly adaptive to risk and defence lawyers may use technical jurisdiction issues to delay prosecutions. The model harnesses the skills of prosecutors, analysts and investigators along with key support personnel. Aside from the strategy analysis team within the DSO, which generates annual threat assessments, much emphasis is placed on the production of tactical information and products. These would include, for example, detailed profiles of syndicates and their members, cell phone calls and financial dealings.

Using this information, investigators and forensic experts are able to gather statements and hard evidence that can be used to convict criminals. From the outset of the case, prosecutors are able to provide guidance on the prosecution strategy and the type of information that will be necessary to successfully prosecute on a range of charges. These people are located together and work in project teams. The personnel are drawn from all racial and ethnic groups, genders and ages and have a diverse range of graduate qualifications and skills, which enhances their ability to conduct criminal investigations. Recruitment is based on merit and equity requirements and any person who meets the criteria may apply. The organisational culture is

generally one of innovation, cooperation and learning.

The SCCU uses the same model as the DSO but does not employ analysts. The latter functions are performed by prosecutors. However, the SCCU has dedicated on-site courts, which are serviced by the co-located police and prosecutors. These courts consequently sit much longer hours and are more effective than the average court.

The DSO and the SCCU have been among the first agencies to convict auditors and financial directors for false reporting and asset stripping, and to prosecute criminals for racketeering, corruption and money laundering. By 2007, the SCCU had finalised 1 400 complex financial crime cases and had an average conviction rate in excess of 94 per cent. The DSO had finalised 1 500 cases, obtained 1 600 arrests and had an average conviction rate of between 80-90 per cent. In addition, DSO investigations led to the seizure of R5 billion in contraband and, with the AFU, the civil forfeiture of R1,5 billion, making it one of the major contributors to the Criminal Asset Recovery Account.

Benefits of these models

The major benefits of the DSO and SCCU model for criminal justice integration are outlined below:

- The early involvement of prosecutors means that cases with no prospect of success, owing to lack of evidence or technical problems, are closed at an earlier stage
- Cases are properly prepared and prosecuted
- Specialisation improves training and confidence among analysts, police and prosecutors
- Prosecutors can assist the police and they have ownership and accountability for cases (few prosecutors will deal with one case through its life cycle in other courts)
- Prosecutors have time for case preparation and consultations with victims (unlike in other units) and develop relationships with clients, which in turn improves information
- As organised and commercial crime and corruption cases are complex and often unique in their characteristics, senior advocates and the private sector (particularly the forensic investigators) mentor younger prosecutors and

this has become part of the culture

- The proximity of police and prosecutors makes it quicker to investigate cases properly and collective efforts are a recipe for success witnessed by the high conviction rates attained
- Plea bargaining works very effectively in the DSO and SCCU model
- Criminals and experienced defence lawyers are met with equivalent skills
- The magistrates receive better quality cases when the SCCU members appear before them
- There are fewer logistical problems and it is less time consuming when the personnel are co-located
- The presence of analysts, police and prosecutors and magistrates provides a check on the abuse of power e.g. corruption

Transferring the DSO and the SCCU to the police

In May 2008, the General Law Amendment Bill of 2008 was introduced into parliament. It transfers the functions and powers of the DSO to the South African Police Service (SAPS). Detractors of the DSO argue that the composition of the unit harms prosecutorial integrity and that its activities have breached the constitutional rights of the accused. Furthermore, it stands accused of conducting illegal intelligence operations and using unvetted private security agencies and personnel. The National Prosecuting Authority has denied all of these claims and has outlined its case in affidavits before court. The main issues of contention, however, appear to be the location of the DSO and its proactive investigative mandate.

The Bill locates the new Directorate for Priority Crime Investigation (DPCI) squarely under the control of the National Commissioner of Police, which means that it will not have the functional independence the DSO has enjoyed. It will rely on referrals from the National Commissioner of Police, who in turn has to be informed by the provincial commissioners that an organised crime syndicate is suspected to be operating in the province. The layers of bureaucracy that must be transversed to start an investigation are cumbersome and will hinder decisive action against criminal groups, who usually have the resources and sophistication to counter law enforcement activity.

The legislative mandate of the DPCI has some specific clauses dealing with types of crimes to be investigated and 'omnibus clauses' which attempt to capture all forms of possible criminal activity within its mandate. The mandate of the proposed DPCI has been diluted because it will not be able to proactively investigate cases as has been the case in the DSO. The specific clauses suggest that the mandate of the DPCI will be founded on an arguably outdated definition of organised crime because it largely confines its investigations to traditional forms of the crime and those activities conducted by 'mafia-style' structured organised crime groups. The nature of organised crime is evolving and traditionally structured organised crime groups are relatively rare in South Africa. Now criminals (like some multi-national companies) outsource and privatise many of their essential activities. Owing to the nature of organised and financial crime and its symbiotic relationship with corruption, combating strategies should include a proactive attempt to anticipate, prevent and disrupt criminal networks before they can commit or repeat their crime.

The wide powers to investigate enjoyed by the DSO will be transferred to the National Commissioner of Police and the DPCI functionaries. As the 'omnibus' clauses mandating the DPCI are broad and vague, it is likely that criminals will contest the constitutionality of the powers afforded to it, delaying criminal trials.

At the time of writing, it appears that the main intention is to transfer the DSO and commercial crime investigators to the DPCI. The other nine functional groups within the DSO, such as analysts, will form part of Crime Intelligence or other divisions. The transfer will disrupt the existing co-located structures of both the DSO and the SCCU, which can currently draw on a far wider range of skills complementary to the investigation of crime. The DPCI will have to rely on ad hoc intelligence and analysis assistance from the Criminal Intelligence Group within the SAPS, who have a broader intelligence-gathering mandate.

In the DSO, for example, crime analysts play a vital role in developing the strategy of the organisation

and delivering tactical products for investigation. On projects, analysts obtain crime information, and through sophisticated analysis software provide profiles of criminal groups and investigation leads, and make the information accessible for those involved in the trial. In the well-known Najwa Petersen murder trial, police used analysts from outside the service to conduct detailed cell phone billings, which showed that Petersen had telephoned the alleged killers before the murder. In the DSO, on site analysts provide investigators with ongoing support in understanding how the criminal network operates and the details of the financial transactions it carries out.

Some prosecutors may be seconded to the DPCI but will be confined to playing an investigative function, while their colleagues in the National Prosecution Service (NPS) will be requested to prosecute the cases. If DSO prosecutors choose to go to the SAPS, there may be less capacity within the NPS to prosecute organised and financial crime and corruption. If the prosecutor is only involved in the case after the investigation is concluded, s/he will not be familiar with the complexities of the case and may not succeed in court against highly skilled defence lawyers.

Drawing on the experience of the DSO, an organisation that combines such a diversity of persons and skills may take some time to develop into a seamless and effective team, to learn how to initiate, to develop project-based investigations and to hone people skills. This will also be a challenge in the police environment where extensive restructuring has often stripped specialised units of institutional memory, optimal numbers and sufficiently skilled people.

In addition DSO personnel earn more than police officers. Thus, those DSO staff members going into other SAPS divisions may face poor future prospects because they will be given personal pay notches. They could experience career stagnation until police officers doing the same work catch up to their salary levels. Similarly, the Police and Prisons Officials Union has voiced its concern that its members be treated equally to those moving to the SAPS from other state departments.

Many of the DSO members will have relatively high ranks in the police. The SAPS seldom has large numbers of similar ranked officials deployed in one unit and the prospect of being transferred to other units is high. High-ranking officers in the SAPS seldom carry investigation dockets. Many DSO members are passionate about investigation and would prefer not to work in a largely managerial or administrative capacity. In addition, at present there is no clear career path for detectives. These issues are of concern to many DSO members who may consider finding alternative employment. The stated intention of strengthening the fight against organised and financial crime and corruption may thus be thwarted.

Conclusion

At the time of writing, businessman Hugh Glenister approached the High Court to interdict the government from introducing legislation dissolving the Scorpions. The High Court rejected the application on the grounds that it does not have jurisdiction to intervene in political processes. However, it has given Glenister and opposition parties leave to appeal to the Constitutional Court. Public sentiment is divided on the issue of whether the fight against crime will be improved with the closure of the DSO. The matter may take much longer to resolve than anticipated. However, if the political will to fight organised and financial crime and corruption exists, there may be a need to consider alternative models that will improve on both the DSO, the SCCU and SAPS initiatives and take into account the Khampepe recommendations with regards to the DSO.

A 'third way' model that might be considered is that of the Serious Organised Crime Agency in the United Kingdom. SOCA is a non-departmental public body that reports to an independent board. The Board is appointed by the Home Secretary and it ensures that the agency discharges its statutory mandate and the priorities set by government. The agency has four directorates, namely intelligence, enforcement, intervention and corporate services. The agency combines the skills of co-located intelligence collectors, analysts, investigators and prosecutors and support personnel. Intelligence collectors in SOCA are compelled to adhere to a

national intelligence model protocol, which is applicable to other intelligence agencies in the UK. The Serious Fraud Office has been incorporated into SOCA and there are officials from relevant agencies, like Customs and Excise and Revenue Services, seconded to it.

In South Africa, a unit modelled on SOCA with personnel transferred or seconded from the intelligence agencies, the Receiver of Revenue and Customs and Excise, the DSO and the SAPS Organised Crime Unit would provide a formidable armoury in combating serious and complex organised crime. Board members could be drawn from government and civil society to ensure that there is sufficient oversight of the new body. Investigators could have a dual reporting line to the Board and the Minister of Safety and Security. The new 'political champion' and coordinating and management structure envisaged for the criminal justice system could play a role in managing the daily interface between the proposed unit and the criminal justice agencies.

References

African Private Sector Group World Bank, South Africa 2006. An Assessment of the Investment Climate. Available at www.worldbank.org [accessed 19 May 2008]

Price Waterhouse Cooper 2007. Economic Crime: People, Culture and Controls, Fourth Biannual Global Economic Crime Survey, South Africa. Available at www.pwc.com/crimesurvey [accessed 19 May 2008]

Endnotes

- 1 The 'untouchables' refer to the courageous and incorruptible law enforcement agents who prosecuted Mafi Don Al Capone during the prohibition era in the United States.
- 2 Gail writes in her personal capacity. She is a member of the DSO and has been a consultant for the South African Institute for International Affairs project on organised crime.
- 3 The SAPS Commercial Branch working in the SCCU reports to the police but is co-located with the prosecutors from the National Prosecuting Service.